RENDERED: JULY 12, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002610-MR

HENRY COLLINS — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 81-CI-00102

EVELYN COLLINS — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

DYCHE, JUDGE: Henry Collins appeals an order of the Logan Circuit Court addressing various post-divorce decree issues. We affirm.

Henry and Evelyn Collins were married October 17, 1964. The parties had four children during the marriage; in addition, Henry legally adopted Evelyn's two children from a previous marriage. Henry owned a 135-acre farm at the time of the marriage, and, in 1968, the parties constructed a marital residence on the farm property. In 1979, Henry deeded Evelyn an undivided one-half interest in the farm and marital residence.

On April 9, 1981, Evelyn filed a petition to dissolve the marriage. On May 27, 1981, the trial court entered an order requiring Henry to pay Evelyn $200.00 per week in combined child support and maintenance. In July 1981, the marital residence was destroyed by fire. Between July 1981 and July 1984, Evelyn brought several motions seeking to hold Henry in contempt for failure to pay child support.

On July 20, 1984, the trial court entered a final decree dissolving the marriage. The decree reserved determination of the division of marital property, child custody, child support, and visitation. The decree also indicated that all prior orders, including child support orders, were to remain in full force and effect. On September 10, 1984, Evelyn filed a "Notice of Submission of Case for Final Adjudication" along with her proposed findings of fact and conclusions of law. Subsequently, Evelyn filed periodic motions seeking to hold Henry in contempt for failure to pay child support.

Following one such show cause motion, the trial court entered an order finding that Henry's child support arrearage was $8,000.00 as of August 8, 1986. The order required Henry to pay off the arrearage at the rate of $100.00 per month at 12% interest. The trial court also entered a separate order reducing Henry's child support obligation from $200.00 per week to $300.00 per month resulting in a total payment, after consideration of the arrearage, of $400.00 per month.

On January 16, 1987, Evelyn executed a deed conveying her interest in the parties' farm property to Henry. The deed

recited that the conveyance was in consideration of Henry assuming all of the debt of the farm property. In addition, according to Evelyn, Henry also agreed to commence paying child support if she executed the transfer.

On September 20, 1988, the trial court entered an order dismissing the case without prejudice for want of prosecution pursuant to CR[1] 77.02(2). In December 1991, the parties' youngest child turned eighteen; the child graduated from high school in May 1992. No action was taken in the case between September 1988 and July 1998.

On July 21, 1998, Evelyn filed a motion moving that the September 20, 1988, order dismissing the case be set aside and that the case be reinstated to the court's docket. The trial court reopened the case, evidence was presented, and on August 1, 2000, the trial court entered final judgment in the case. On October 6, 2000, the trial court entered an order denying Henry's motion to alter, amend, or vacate. The order, however, made certain corrections to the August 1, 2000, final judgment. As corrected, among other things, Evelyn was awarded $51,375.00 as her distribution of marital property, $24,980.00 in child support arrearages, and $17,653.00 in interest on the child support arrearages. This appeal followed.

First, Henry contends that the trial court erred in setting aside the January 16, 1987, deed conveying Evelyn's interest in the parties' farm property to Henry. The trial court determined that Evelyn received nothing of legal value by way of

[1]Kentucky Rules of Civil Procedure.

the 1987 conveyance; that she was induced to make the conveyance by Henry's promises to pay child support and her inability to obtain relief from the court; and that Evelyn did not intend by the conveyance to settle her claims. The trial court concluded that the conveyance "should be declared void as between the parties and ignored in determining the remaining claims."

Henry's premise that the trial court "set aside" the January 16, 1987, conveyance is an incorrect premise. At the hearing on Henry's motion to alter, amend, or vacate, the trial court clarified that it did not intend to actually set aside the conveyance and to declare the deed null and void, but, rather, intended only to disregard the transaction insofar as the conveyance would be relevant to the division of the parties' marital property.

The trial court found that Evelyn was induced into making the conveyance based upon Henry's false statements that the farm was facing foreclosure and that he would resume child support payments; this is supported by Evelyn's testimony. This finding is not clearly erroneous and must be upheld on appeal. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); CR 52.01. The standard of review in matters concerning the distribution of marital property is whether the trial court abused its discretion. Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994). Inasmuch as the conveyance was found to be a product of false statements, the trial court did not abuse its discretion in disregarding the January 16, 1987, conveyance.

Next, Henry contends that the trial court erred in setting aside the October 12, 1988, order dismissing the case without prejudice for want of prosecution pursuant to CR 77.02(2). We disagree.

CR 77.02(2) provides that, prior to a dismissal, notice shall be given to each attorney of record. This requirement is mandatory. Hertz Commercial Leasing Corp. v. Joseph, Ky. App., 641 S.W.2d 753, 755 (1982). In this record we find no notice of a suggested dismissal being provided prior to the dismissal. The trial court's determination that there was not proper notice was not clearly erroneous. CR 52.01. Because the mandatory notice was not given, the October 20, 1988, order purporting to dismiss the case was ineffectual, and the trial court properly disregarded it. Hertz Leasing Corp., supra.

Next, Henry contends that the trial court erred in awarding Evelyn an amount representing one-half the value of the parties' marital residence. We disagree.

The parties' marital residence was destroyed by fire in July 1981. The trial court made a finding of fact that Henry had intentionally burned the residence. This finding was not clearly erroneous. CR 52.01. Evelyn testified that Henry admitted to her that he had burned the home. Other witnesses provided deposition testimony which tended to corroborate Evelyn's claim.

The trial court may find dissipation of assets when marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her

proportionate share of the marital property. Robinette v. Robinette, Ky. App., 736 S.W.2d 351, 354 (1987). Under these circumstances, the court will deem the wrongfully dissipated assets to have been received by the offending party prior to the distribution. Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 500 (1998). In view of the testimony that Henry had intentionally burned the marital residence, the trial court did not abuse its discretion by treating the destroyed value in the home as a dissipated marital asset.

Next, Henry contends that the trial court erred in determining the marital and nonmarital portions of the farm property. The trial court determined that Collins purchased the farm prior to the marriage for $20,000.00; that $7,500.00 of the purchase price was paid during the marriage; that Henry had a nonmarital interest in the farm of $12,500.00 ($20,000.00 - $7,500.00); and that the value of the farm at the time of separation was $156,000.00.

Henry argues that because $12,500.00 of the original $20,000.00 purchase price of the farm was found to be nonmarital property, the trial court should have determined the appreciated value of his nonmarital interest in the property in accordance with Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981). We disagree.

The trial court's finding that Henry had a $12,500.00 nonmarital interest in the original $20,000.00 purchase price of the farm seems, at first appearance, to compel the conclusion that Henry has a 67.5% ($12,500.00/$20,000.00) nonmarital

interest in the farm property, and that this percentage of any appreciation of the property not related to the joint efforts of the parties should be assigned to Henry as his nonmarital property. Brandenburg, supra. However, on August 16, 1979, the parties executed a straw deed transaction which conveyed to Evelyn a 50 percent undivided interest in the farm property with the remainder in fee simple to the survivor. Henry's argument ignores the 1979 transaction, which, it appears, would have the effect of realigning the marital/nonmarital interests of the parties and confer each with an equal interest. If this was not the intention of the parties, Henry should have submitted proof to rebut this impression.

Further, Henry has failed to provide an illustrative computation of what he believes would be a proper marital distribution under Brandenburg. The divorcing party asserting that he should receive appreciation upon nonmarital contribution as his nonmarital property carries the burden of proving the portion of the increase in the value of the property attributable to the nonmarital contribution; failure to do so will result in any increase being characterized as marital property. Travis v. Travis, Ky., 59 S.W.3d 904 (2001). In view of the 1979 conveyance and Henry's failure to provide a suggested Brandenburg computation, the trial court did not abuse its discretion by choosing not to apply a Brandenburg formula in calculating Henry's nonmarital share of the property.

Finally, Henry contends that the trial court erred in awarding Evelyn child support arrearages by failing to sustain

his affirmative defenses of waiver, accord and satisfaction, laches, payment, and res judicata.

First, KRS[2] 413.090(1) provides that an action upon a judgment or decree of any court of this state must be commenced within fifteen years after the cause of action first accrued. Fifteen years is the applicable Statute of Limitations in this case. Harvey v. McGuire, Ky. App., 635 S.W.2d 8, 9 (1982). The decree in this case was entered on July 20, 1984; the initial judgment for child support arrearage of $8,000.00 was entered on August 8, 1996; and the $300.00 per month child support order which led to the additional arrearages was entered on August 8, 1986. Evelyn filed her motion to reopen on July 21, 1998, within fifteen years of all of the relevant dates.

Second, it is well established that "[u]npaid child support payments for the maintenance of children become vested when due and courts are without authority to 'forgive' vested rights in accrued unpaid maintenance." Mauk v. Mauk, Ky. App., 873 S.W.2d 213, 216 (1994). Child support payments become vested when due, so "each installment of child support becomes a lump sum judgment, unchangeable by the trial court when it becomes due and is unpaid." Price v. Price, Ky., 912 S.W.2d 44, 46 (1995)(quoting Stewart v. Raikes, Ky., 627 S.W.2d 586, 589 (1982))(emphasis in original). "[I]nactivity and alleged laches on the part of [appellee] cannot be attributed to the children for whose benefit the original maintenance award was made." Holmes v. Burke, Ky., 462 S.W.2d 915, 918 (1971); Glanton v.

[2]Kentucky Revised Statutes.

Renner, 285 Ky. 808, 149 S.W.2d 748 (1941). Child support is a statutory duty intended to benefit the children rather than the parents. Clay v. Clay, Ky. App., 707 S.W.2d 352 (1986). The right to child support belongs to the child not the parents. Gaines v. Gaines, Ky. App., 566 S.W.2d 814 (1978). Generally, child support cannot be waived or diminished solely by agreement or action of the two parents. See Whicker v. Whicker, Ky. App., 711 S.W.2d 857 (1986). Accordingly, it is possible for parties to enter a binding oral agreement to reduce future child support payments, but past-due child support payments cannot be reduced retroactively.

Henry does not discuss his affirmative defenses in detail, and cites to little, if any, authority as to why the defenses would apply in these circumstances. We likewise will not discuss the defenses in detail; however, we are not persuaded that Henry is entitled to escape his child support arrearages under waiver, accord and satisfaction, laches, payment, or res judicata.

The judgment of the Logan Circuit Court is affirmed.

ALL CONCUR.

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